Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator by Premio Computer, Inc.; Request for Waiver	)	CC Docket No. 02-6

REQUEST FOR REVIEW OF THE DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY PREMIO COMPUTER, INC.; REQUEST FOR WAIVER

Premio Computer, Inc.
918 Radecki Court
City of Industry, CA 91748

Paul J. Loh
Nhan T. Vu
Willenken, Wilson, Loh & Lieb, LLP
707 S. Wilshire Blvd., Ste. 3850
Los Angeles, CA 90017
(213) 955-9240

Counsel for Premio Computer, Inc.

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SUMMARY

Premio Computer, Inc. seeks review of the determination by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC" or "Administrator") that it must repay certain funds disbursed under the Schools and Libraries Universal Service Support Mechanism ("E-Rate") program. These funds concern two Internal Connections projects undertaken by the Los Angeles Unified School District ("LAUSD") pursuant to which Premio was to supply 18 LAUSD schools with computer servers for the purpose of networking and accessing the Internet.

After Premio had already installed 30 out of 128 computer servers, LAUSD instructed Premio to stop shipment of the servers. Premio had no choice but to comply as LAUSD categorically refused to accept the remaining servers or allow Premio to install them at the schools. Premio and LAUSD eventually resolved their dispute in court and no determination was ever made that the servers did not meet any applicable contractual, regulatory or legal requirements. Nonetheless, LAUSD has never allowed the remaining 98 servers to be installed in its schools.

Despite the fact that Premio expended substantial amounts of money and labor to manufacture the servers, was at all times willing and able to meet its obligations to deliver the servers on the dates and at the locations specified by LAUSD, did everything in its power to ensure that no laws or regulations were violated, and was not the party most responsible for causing the violations, SLD determined that Premio was responsible for repayment of the E-Rate funds that had been paid for the 98 servers. SLD alleged that Premio had not "delivered" the servers, "installed" the servers and had improperly "billed" SLD. The Administrator denied Premio's appeal of SLD's decision.

However, neither the SLD's nor the Administrator's decision can stand. Both decisions contain numerous procedural errors that made it impossible for Premio to adequately respond. In particular, neither the SLD's *Notification of Improperly Disbursed Funds Letter* ("Notification") nor the *Administrator's Decision on Appeal* ("Decision on Appeal") identifies the specific law or rule that Premio is alleged to have violated. Furthermore, it is unclear what amount SLD seeks to recover and how that amount was calculated. Second, SLD failed to demonstrate that Premio's conduct in relation to the E-Rate contract in question violated any law or rule. Premio did everything in its power to actually deliver the servers and should not be held responsible if LAUSD refused to allow Premio to install the servers. Third, SLD failed to complete its investigation within the five-year limitations period set by the Commission, to the detriment of Premio.

In the alternative, Premio respectfully requests that the Commission waive any violations that did occur. It would be manifestly unfair to Premio to require it to return the funds at issue. Consequently, the FCC should rescind the Notification and Decision on Appeal and order the Administrator and SLD not to seek funds recovery in this case.

Finally, Premio requests that the Commission order SLD to disburse funds due under an unrelated funding request that SLD withheld pending resolution of this dispute. There is no valid basis upon which to refuse to disburse these funds. These funds should be released to Premio, or in the alternative, set-off against any amounts

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REQUEST FOR REVIEW OF THE DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR BY PREMIO COMPUTER, INC.; REQUEST FOR WAIVER

I. INTRODUCTION.

Pursuant to Section 54.719(c) of the rules of the Federal Communications Commission ("FCC" or "Commission"),[1] Premio Computer, Inc. ("Premio") hereby seeks the Commission's review of two decisions of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC" or "Administrator"). The decisions at issue are: (1) SLD's transmission of a *Notification of Improperly Disbursed Funds Letter* ("Notification") dated August 10, 2005, to Premio concerning two Internal Connections projects undertaken by the Los Angeles Unified School District ("LAUSD") pursuant to the Schools and Libraries Universal Service Support Mechanism ("E-Rate")[2] and (2) the *Administrator's Decision on Appeal* ("Decision on Appeal"), dated August 30, 2006, by which the Administrator denied Premio's

[1] 47 C.F.R. § 54.719(c).

[2] *See* Exhibit A of this Request for Review. Hereinafter, all references to "Exhibit" shall be to exhibits to this Request for Review, unless otherwise specified.

appeal of the Notification.[3] Premio has an interest in these determinations because SLD is attempting to recover from Premio funds that SLD alleges were erroneously distributed.[4]

However, the Notification and Decision on Appeal cannot stand. SLD made numerous procedural errors in the Notification and Decision on Appeal that made it impossible for Premio to adequately respond. In particular, neither the Notification nor the Decision on Appeal identifies the specific law or rule that Premio is alleged to have violated. Furthermore, it is unclear what amount SLD seeks to recover and how that amount was calculated. Second, SLD failed to demonstrate that Premio's conduct in relation to the E-Rate contract in question violated any law or rule. Third, SLD failed to complete its investigation within the five-year limitations period set by the Commission, to the detriment of Premio.

In the alternative, Premio respectfully requests that the Commission waive any violations that did occur. It would be manifestly unfair to Premio to require it to return the funds at issue. Consequently, the FCC should rescind the Notification and Decision on Appeal and order the Administrator and SLD not to seek funds recovery in this case.[5]

Therefore, Premio seeks a determination of the following issues: [6]

1. Should the Commission order the Administrator and SLD to take no further steps to recover E-Rate funds in this matter from Premio because
    a. USAC and SLD failed to specify the basis for their determination and calculations;

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[3] *See* Exhibit B.

[4] *See* 47 C.F.R. § 54.721(b)(1).

[5] *See* 47 C.F.R. § 54.721(b)(4).

[6] *See* 47 C.F.R. § 54.721(b)(3).

b. Premio has not violated any law or rule in its implementation of the E-Rate contract at issue here; and

c. USAC and SLD failed to complete the investigation within the relevant limitations period set by the Commission?

2. Should the Commission waive any violations that did occur and order the Administrator and SLD not to seek funds recovery in this case in light of the manifest unfairness to Premio?

II. STATEMENT OF FACTS.

In 1998, the Los Angeles Unified School District solicited bids on a five-year contract for computer and telecommunications services and products ("Contract"). The intended beneficiaries of the Contract were 18 public schools collectively referred to as Cluster 07, or the Grant/Van Nuys Cluster, of the LAUSD. The Contract was funded for the most part by the E-Rate program – approximately 89% of the Contract payments were to come from Universal Service Funds through the E-Rate program and approximately 11% from the LAUSD.

LAUSD accepted Contract bids for different categories of products and services. In March of 1998 LAUSD awarded Premio with the Internal Connections portion of the Contract, which granted Premio the exclusive right to provide Internal Connections products and services to Cluster 07 from 1998 through 2003. Lucent Technologies ("Lucent") was awarded the Telecommunications Services portion of the Contract.

By the end of the first year of the Contract (1998 to 1999, hereinafter "Year One"), Premio had timely delivered, among other things, 120 servers to Cluster 07 schools. LAUSD and SLD made timely and full payment to Premio for all products and services that it provided that year and there is currently no dispute concerning these products and services.

However, in the early stages of Year One, Lucent defaulted on the Telecommunications Services portion of the Contract. It failed to provide the necessary networking equipment and services. As a result of Lucent's default, none of the wiring needed to bring network and Internet connectivity to classroom computers was installed.

In addition, Lucent's Year One default posed a serious financial problem for LAUSD. Under the circumstances, none of the computers which LAUSD purchased that year qualified for E-Rate funding. According to E-Rate guidelines, LAUSD's computer purchases were eligible for federal subsidy only if the machines were used for networking and accessing the Internet.[7]

To remedy the situation, LAUSD devised a solution whereby existing regular telephone lines could be utilized to bring Internet and network connectivity to classroom computers. This required Premio to modify its Year One scope of work by (i) reducing the number of servers to be delivered from 176 to 120, and (ii) using the remaining funds to acquire special networking equipment and services from another company, Objective Communications/VNCI ("VNCI"). Accordingly, Premio proceeded to fulfill its Year One obligations by delivering servers as well as VNCI proprietary networking equipment.

In the wake of Lucent's default, LAUSD also petitioned SLD to transfer to Premio approximately $2.1 million in Year One E-Rate funding that was originally earmarked for Lucent. LAUSD wanted to fund Premio so that it could provide additional complementary network servers and equipment during the second year of the Contract (1999 to 2000, hereinafter "Year Two").[8]

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[7] *See* Exhibit D at 1 (noting that only "telecommunications and Internet servers" were eligible for E-Rate funding).

[8] *See* Exhibit C.

SLD ultimately approved LAUSD's request.[9] In turn, LAUSD issued a purchase order authorizing Premio to provide additional products and services during Year Two using Lucent's Year One federal funds.[10] This arrangement, whereby Premio received and used Year One money to deliver products and services in Year Two will be referred to as "Year One-Carryover." Premio and LAUSD agreed that these Year One-Carryover funds would be used to purchase 128 servers ("Year One-Carryover Servers").[11]

During March and April of 2000, Premio manufactured and began delivering to LAUSD the 128 Year One-Carryover Servers. In early 2000, LAUSD filed FCC Form 486 (Receipt of Service Confirmation Form), by which LAUSD affirmed to SLD that it had received the Year One-Carryover Servers from Premio. In March of 2000, SLD sent Premio a Form 486 Notification Letter, informing Premio that SLD had received LAUSD's Form 486 and specifically instructing Premio that "You may now begin to submit invoices to the SLD for the Services covered by the Form(s) 486."[12] In compliance with SLD's instructions, Premio then submitted the proper invoices and was paid $895,541.05 pursuant to Funding Request Number ("FRN") 238460 and $961,348.97 pursuant to FRN 238465. Both FRNs covered the Year One-Carryover Servers and the payments constituted the approximately 89% share of the Contract payments that were to be covered by the E-Rate program.

However, after Premio delivered just 30 of the machines, Jim Alther of LAUSD's E-Rate Management Office called Steve Newton, Premio's then-Vice President of Government Sales,

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[9] *See* Exhibit E.

[10] *See* Exhibits F & G.

[11] *Id.*

[12] *See* Exhibit H.

and instructed Premio to suspend its server shipments. Alther claimed that, because LAUSD had not made final decisions about its technical requirements for subsequent Contract years, Premio should wait so as to minimize potential incompatibility issues between the Year One-Carryover machines and LAUSD's future technology needs.[13]

Months and then years went by, but LAUSD never contacted Premio to resume shipment of the Year One-Carryover Servers. Moreover, LAUSD refused to accept the remaining servers and offered no explanation why. Despite repeated requests, LAUSD refused to pay Premio the $229,514.35 that it still owed for the Year One-Carryover servers.[14] The remaining 98 Year One-Carryover Servers sat on pallets in Premio's warehouse. However, at all times during this period, Premio was able and willing to transport the remaining Year One-Carryover Servers to the 07 Cluster schools and install them.

Left with no other choice, on February 14, 2003, Premio filed suit against LAUSD alleging in its Complaint, among other things, that LAUSD breached its contractual obligations by failing to pay its apportioned obligation of $229,514.35 for the Year One-Carryover Servers.[15] Premio and LAUSD litigated this case for over two and a half years.

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[13] LAUSD eventually claimed that the Year One-Carryover Servers did not meet LAUSD specifications and did not qualify for the E-Rate Program. A comparison of the LAUSD specifications and the details of the Year One-Carryover Servers proved that this was, in fact, false. The servers met or exceeded every guideline set by the LAUSD. *See* Exhibits I, J & K. Further, an expert commissioned jointly by Premio and LAUSD affirmed that the Year One-Carryover Servers were E-Rate compliant. *See* Exhibit L at 9-10.

[14] This amount constituted the approximately 11% of the Contract payments for which LAUSD was responsible.

[15] *See* Exhibit M. For the sake of brevity, the exhibits attached to Premio's complaint have been removed. Relevant exhibits in that complaint have been attached as separate exhibits to this Request for Review.

While the case was ongoing, LAUSD sent USAC a letter in September of 2003 stating, contrary to the certifications in its Form 486, "that Premio had not provided certain products and/or services for which is [sic] had received disbursements from USAC."[16] SLD then began an investigation into the matter and pending that investigation, refused to disburse $716,638.40 in funds due to Premio under FRN 260296, which was a funding request unrelated to the Year One-Carryover Servers.

In 2004 and even into 2005, USAC's investigation continued without any resolution. On several occasions, counsel for Premio requested the status of USAC's investigation from counsel for USAC, but received little in the way of information.[17] On August 10, 2005, more than five years after Premio made its final delivery of the Year One-Carryover Servers, SLD sent to Premio a *Notification of Improperly Disbursed Funds Letter* concerning the funds paid for the Year One Carryover Servers. SLD demanded the return of $566,330.05 of the $895,541.05 disbursed under FRN 238460 and the entire amount, $961,438.97, disbursed under FRN 238465.[18] The Notification made no mention of the $716,638.40 that was owed under FRN 260296.[19] Premio and LAUSD settled their lawsuit shortly thereafter.

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[16] *See* Exhibit N. This letter references an earlier conversation in which a representative of LAUSD, Greg McNair, informed USAC that "while Premio submitted invoices and received payments on FRNs 238460 and 238465, LAUSD did not issue the appropriate purchase orders or receive goods or services under these FRNs." This statement is clearly incorrect as it is undisputed, and SLD found, that Premio actually delivered and installed at least 30 of the servers. The letter also states that "Premio did meet its obligations and provided LAUSD goods and services under FRN 260296," a statement which is correct, even though USAC has not yet paid for its share of these goods and services.

[17] *See* Exhibit O.

[18] *See* Exhibit A.

[19] *Id.*

Premio appealed the Notification to the SLD on October 7, 2005 ("Premio Appeal").[20] Almost a year later, SLD denied the Premio Appeal on August 30, 2006.[21] The Decision on Appeal failed to make any mention of FRN 260296 or the $716,638.40 due to Premio pursuant to that funding request. To date, SLD has not disbursed the funds due under FRN 260296 and has not formally announced an intention to deny disbursement or provided an explanation for its refusal to disburse funds.

III. THE FCC SHOULD ORDER THE ADMINISTRATOR AND SLD NOT TO SEEK FUNDS RECOVERY IN THIS CASE.

A. USAC and SLD Made Numerous Procedural Errors That Make It Impossible for Premio to Fully Respond to SLD's Allegations.

1. Failure to Identify Legal or Regulatory Basis.

In determining which party is responsible for returning disbursed E-Rate funds, the Commission has instructed the Administrator to focus on the party most responsible for the statutory or rule violation.

> We direct USAC to make the determination, in the first instance, to whom recovery should be directed in individual cases. In determining to which party recovery should be directed, USAC shall consider which party was in a better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation.[22]

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[20] *See* Exhibit P. For the sake of brevity, the exhibits attached to Premio's appeal to USAC have been removed. Relevant exhibits in that appeal have been attached as separate exhibits to this Request for Review.

[21] *See* Exhibit B.

[22] *In the Matter of Federal-State Joint Board on Universal Service; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.; Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15252, FCC 04-181, ¶ 15 (July 30, 2004) (hereinafter "Fourth Report").

The Administrator relied on this directive in denying Premio's appeal and finding that Premio "should be a [sic] party to whom recovery should be directed."[23]

However, nowhere in the Notification or in the Decision on Appeal did USAC or the SLD ever cite the specific statute or rule which Premio is alleged to have violated.[24] This violates clear law, which requires that the basis of agency action "must be clearly set forth."[25]

USAC's and SLD's actions not only violate well-established law, but place Premio in a difficult position as a practical matter. Just as a court cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive,"[26] Premio cannot be expected to explain why USAC's decision is wrong or contrary to existing statutes or rules without being provided the specific legal basis for the alleged violation.[27]

The closest that USAC comes to meeting this requirement is to cite to 47 C.F.R. §§ 54.501(a) and 54.517 and argue that "[t]hese rules are violated if the service provider receives payment for services and/or products that were not delivered to the eligible entity."[28] However,

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[23] *See* Exhibit B at 3

[24] In fact, in Premio's appeal to USAC, Premio specifically requested that "if USAC denies this appeal, it explain the particular legal authority or authorities on which it relies (including citations to the pertinent regulations) to support the determination that Premio violated an FCC rule in connection with the disbursement of the funds at issue." *See* Exhibit P at 6.

[25] *Atchison, T. & S.F. Ry.*, 412 U.S. 800, 808 (1973); *see also Recinos de Leon v. Gonzalez*, 400 F.3d 1185, 1189 (9th Cir. 2005) (basis for an agency determination "must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action.") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)).

[26] *Chenery Corp.*, 332 U.S. at 197.

[27] *See Communications and Control., Inc. v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) ("[W]e cannot evaluate the reasonableness of an interpretation the Commission did not set forth.").

[28] *See* Exhibit B at 2-3. SLD did worse and referred only to the violation of unspecified "program rules" and "FCC rules. *See* Exhibit A at 1 & 5-6.

these provisions generally authorize certain companies that "provide" certain products and services to schools and libraries to participate in the E-Rate program.[29] They say nothing about the methods of delivery of those products and services, as USAC alleges. If these provisions are the only bases upon which USAC and SLD argue that Premio must return the funds in question then Premio prevails as it clearly "provided" the products.[30]

However, USAC and SLD also imply that Premio invoiced and received payment for goods or services it did not "deliver,"[31] failed to "install" products,[32] and improperly "billed" for products[33]. However, the language used by USAC and SLD is too imprecise to allow Premio to make an adequate response. First, while SLD implies Premio failed to "deliver," "install" and/or properly "bill" for the goods and services in question, it is unclear upon which of these bases SLD is demanding repayment. It could be one, two, three, or none of these bases. Furthermore, Premio has no way of knowing if these are the only violations of which it is accused. There may well be other laws or rules SLD believes Premio violated but has failed to make clear to Premio. SLD's failure to cite to specific laws or rules has left Premio in the dark about the accusations leveled against it. Premio cannot respond when it cannot be sure what SLD alleges it did wrong.

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[29] Section 54.501(a) states, "Telecommunications carriers shall be eligible for universal service support under this subpart for providing supported services to eligible schools, libraries, and consortia including those entities."

Section 54.517(a) states, "Non-telecommunications carriers shall be eligible for universal service support under this subpart for providing the supported services described in paragraph (b) of this section for eligible schools, libraries, and consortia including those entities."

[30] *See* Section III.B *infra.*

[31] *See* Exhibit A at 5-6; Exhibit B at 3.

[32] *See* Exhibit A at 2.

[33] *See* Exhibit A at 3.

Furthermore, even if Premio assumed that it is being accused of failing to "deliver," "install," and properly "bill," it cannot fully respond because there is no guidance as to what these words mean. "Install" means something very different from the word "deliver," even though SLD uses them interchangeably. It is important for Premio to know whether the law and rules require it to do one, none or both. In addition, does "delivery" require Premio to make the products available at its location, to be ready to transport the products or to actually transport the product to a particular location (even if Premio is barred from going there)? Is it proper to "bill" when the sale is agreed upon, when the products are tendered, when the products are actually transported, or when the products are installed and in use? All of these meanings for "delivery" and proper "billing" are possible, yet which one of these meanings is to be used here is critical to the resolution of this dispute. Citation to specific laws and rules would greatly assist Premio as such provisions often include definitions of key terms, or court or Commission decisions may have defined the key terms.

2. Failure to Specify and Properly Calculate the Amount Owed.

USAC and SLD further make a response by Premio difficult by being unclear in the amount they now seek and the method by which they calculated that amount. For example, in the Notification, SLD did not specify one amount but stated that SLD would seek recovery of $566,330.05 on one page (under FRN 238460) and $961,438.97 on another page (for FRN 238465).[34] Presumably, SLD seeks a total of $1,527,769.02 (the sum of those two amounts), although Premio cannot be sure. However, in the Decision on Appeal, the Administrator states that "SLD will continue to seek recovery of the $566,330.05 of improperly disbursed funds," but

[34] *See* Exhibit A at 5-6.

makes no mention of the $961,438.97 in any part of the Decision.[35] It is unclear whether USAC has been swayed by one of Premio's arguments on appeal to forego collection of the $961,438.97 and if so, on what basis. This makes it impossible for Premio to fully respond to the Administrator's Decision.

Even then, the $566,330.05 that the Administrator determined was still owed is likely a flawed calculation. In coming to that number SLD explains that the total amount of funds payable under FRN 238460 was $895,541.05. However, SLD notes that the "applicant and service provider were only able to verify that $369,900.00 ($12,330.00*30) worth of servers were actually delivered for this funding request."[36] Presumably, this refers to the 30 Year One-Carryover Servers that Premio was allowed to install before LAUSD ordered it to stop shipments. However, SLD then concludes that it will seek recovery of "$566,330.05 ($895,541.05 - $329,211.00) of improperly disbursed funds from the service provider."[37] SLD provides no explanation of why it deducted $329,211.00 or how it determined that this was the proper amount to deduct. This is indicative of the utter lack of clarity and justification which pervade the Notification and Decision on Appeal. In its Appeal to USAC, Premio asked for clarification or a calculation adjustment on that matter, but the Administrator never responded.[38] Again, Premio cannot respond to calculations that are not comprehensible on their face if SLD refuses to explain its methodology. The Commission should rescind the Notification and Decision on Appeal and order SLD to explain its calculations so that Premio may fully respond.

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[35] *See* Exhibit B at 2.

[36] *See* Exhibit A at 5.

[37] *Id.*

[38] *See* Exhibit P at 12.

B. Premio Did Not Violate Any Laws or Rules and Was Not at Fault for Violating Any Laws or Rules.

Despite the fact that SLD has been anything but clear in specifying the bases for its demand for repayment, Premio will attempt to respond to the allegations leveled against it, to the extent such allegations can be determined. As discussed above, Premio believes that the Administrator and SLD argues that it has violated 47 C.F.R. §§ 54.501(a) and 54.517 and alleged that it failed to "deliver," "install," and properly "bill" for the Year One-Carryover Servers. Without conceding the argument that it cannot determine and fully respond to the bases for USAC's and SLD's decisions, Premio will assume that these are the bases for the decisions and respond accordingly.

First, as explained above, Premio has not violated 47 C.F.R. §§ 54.501(a) and 54.517 because these provisions only generally authorize certain companies to participate in the E-Rate program. They say nothing about the methods of delivery of products and services and in fact, do not even use the word "delivery" or any similar word. Even reading these provisions in the light most favorable to the Administrator, the merely require that Premio "provide" the products described in the contract. Here, Premio manufactured and tendered the products described in the Contract. It was ready, able and willing at the times prescribed in the Contract to transport the product to the Cluster 07 schools and install them. It did in fact install 30 of the Year One-Carryover Servers at Cluster 07 schools until it was ordered to cease doing so by LAUSD. It is clear given these facts that Premio did "provide" the servers to LAUSD and cannot be faulted if LAUSD refused to accept them.

SLD also appears to have hinged its conclusion that funds were improperly disbursed on the fact that some of the Year One-Carryover Servers were not "delivered."[39] However, Premio repeatedly explained to SLD that it tendered all the servers provided for under FRNs 238460 and 238465 to LAUSD and LAUSD agreed that this was the case.[40] There is no dispute that Premio actually delivered 30 servers pursuant to FRN 238460. Furthermore, it constructively delivered the rest to LAUSD. Constructive delivery is a common law doctrine widely recognized in the vast majority of states, including California, where the Contract was negotiated, executed and implemented. Under California law, Premio did in fact deliver all of the Year One-Carryover servers to LAUSD.[41] It is unreasonable to conclude that Premio's tender of the servers to LAUSD with intent to transfer title to LAUSD, and LAUSD's rejection of those servers -- a rejection which Premio has always maintained and continues to maintain was wrongful -- constitutes non-delivery by Premio.

In any case, the Commission was clear in its instructions to USAC that it should demand repayment from the "party [which] was in a better position to prevent the statutory or rule violation, and which [] committed the act or omission that forms the basis for the statutory or

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[39] *See* Exhibit A at 5-7 ("funds were disbursed for products and/or services that were not delivered").

[40] *See, e.g.,* Exhibit O at 023-027.

[41] *See Perry v. Wallner*, 206 Cal. App. 2d 218, 221 1962 ("The test under which delivery is to be determined is to ascertain whether, in parting with the possession of the conveyance, the grantor intended thereby to divest himself of title. If he did, there is an effective delivery of the deed; otherwise there is no delivery. The determination of this question is based entirely on the intention of the grantor . . . "); *GM Acceptance Corp. v. Gilbert*, 196 Cal. App. 2d 732, 739 (1961) ("A constructive delivery of a written document evidencing the right of the assignee with the intention of passing title may be sufficient to pass title. Delivery to the assignee personally is not essential. Constructive delivery may be sufficient.").

rule violation."[42] Here, Premio was not in a better position to prevent the violation and did everything in its power to ensure that the servers were "actually delivered". Correspondence from counsel for LAUSD to SLD during the course of the investigation confirmed that LAUSD refused to accept the last 98 servers.[43] Here, Premio manufactured the goods, tendered them and was ready and willing to transport them to the locations required by the LAUSD and install them, but it was ordered by LAUSD not to do so. Premio was not in a better position to avoid the violation and did not commit the act (refusing to take accept the servers) which led to the violation. SLD completely failed to follow the Commission's directives and made no effort whatsoever to determine which party was in a better position to avoid the violation. Neither the Notification nor the Decision on Appeal contains any discussion or analysis of this pivotal issue.[44]

SLD also seems to suggest that the responsibility for LAUSD's wrongful rejection of the tendered servers can be shifted to Premio because Premio, the service provider, issued invoices to SLD.[45] Premio's actions, however, can hardly constitute a violation since they were

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[42] Fourth Report ¶ 15. Previously, recovery was always directed to the service provider, who might then have a claim against the school or library for the recovered amount. The FCC's Fourth Report recognized that in many instances, the school or library is the culpable party. *Id.*

[43] *See* Exhibit O at 057 & 060. LAUSD gave no valid reason for its refusal to accept the Servers. *See* note 13 *supra*. Thus, the blame for the failure to deliver the Servers rests solely on LAUSD.

[44] SLD also accuses Premio of failing to "install" the Year One Carryover servers. *See* Exhibit A at 2. SLD seems to use the term "install" interchangeably with "deliver." However, even assuming that this is a different allegation and constitutes a different violation, Premio is no more responsible for the failure to install than it was for the failure to deliver. Premio obviously could not install servers which LAUSD was unwilling to accept, especially when there was no indication LAUSD would have granted Premio access to the Cluster 07 schools. Any attempt by Premio to install the servers against LAUSD's will would have amounted to trespass and other violations of law.

[45] *See* Exhibit A at 6-7.

authorized by SLD itself! Here, Premio did not submit a single invoice to SLD until it received the Form 486 Notification Letter, dated March 6, 2000, from SLD.[46] That letter informed Premio that LAUSD had confirmed that Premio had begun delivering the Year One-Carryover Servers, and instructed Premio that "You may now begin to submit invoices to the SLD for the services covered by the Form(s) 486."[47] The Form 486 Notification Letter specifically stated that it covered FRNs 238460 and 238465.[48]

Furthermore, Premio acted in a commercially reasonable manner under the circumstances. It signed a contract with LAUSD, manufactured the servers and was in the process of delivering and installing the servers when it issued the invoices. It had already received explicit authorization from the SLD to submit invoices and could not predict that LAUSD would subsequently wrongfully refuse to accept them. It is unfair and unwarranted for SLD to now claim that Premio improperly "billed" SLD.

Even if improper billing occurred, the fault for that does not lie with Premio and under Commission guidelines, SLD cannot seek repayment of the funds where another entity was in a better position to avoid such violations. In this case, it was LAUSD that submitted Form 486 confirming receipt of the Year One-Carryover Servers before it determined that it would not accept the servers. If LAUSD had not submitted the Form 486 prematurely, Premio could not have invoiced SLD and SLD would not have disbursed any funds to Premio.[49]

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[46] *See* Exhibit H.

[47] *Id.*

[48] *Id.*

[49] *See In re Changes to the Board of Directors of the Nat'l Exchange Carrier Assoc.*, 15 FCC Rcd 22975, FCC 97-21, ¶ 3 n.9 (Sept. 21, 2000) ("SLD only disburses actual discount funding to a service provider after the applicant notifies SLD that the service provider has begun delivering the supported services, and the service provider submits an invoice.").

Furthermore, it was LAUSD's refusal to accept the servers that made the invoices improper. Premio tendered the servers to LAUSD and was in the process of installing them when it issued the invoices to SLD. These six invoices are attached hereto as Exhibit Q. As Exhibit Q reflects, Premio issued these invoices on the following dates:

Date	**Invoice Number**	**Amount**
March 31, 2000	CA-040100	$376,450.00
April 7, 2000	CA-040600	$301,160.00
April 12, 2000	CA-041000	$217,931.05
April 14, 2000	CA-041400	$376,450.00
April 17, 2000	CA-041700	$301,160.00
April 20, 2000	CA-042000	$283,828.97

However, all of the invoices were issued *before* LAUSD ordered Premio to suspend delivery on May 12, 2000. Put simply, Premio did everything it was supposed to do under this E-rate Contract, and it deserves the compensation for which it contracted, both from LAUSD and SLD.

C. SLD Did Not Complete Its Investigation Within the Limitations Period.

The FCC's Fifth Report and Order established a five-year administrative limitations period for audits or other investigations by the Commission and SLD. The Order stated:

> Under the policy we adopt today, SLD and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule within five years of the *final delivery of service* for a specific funding year.[50]

[50] *In re Matter of Schools and Libraries Universal Support Mechanism*, 19 FCC Rcd 15808, FCC 02-6, ¶ 32 (Aug. 4, 2004) ("Fifth Report and Order") (emphasis added).

Furthermore, the Commission made clear that it is not enough to initiate the investigation within the five-year period: "[W]e will initiate *and complete* any inquiries to determine whether or not statutory or rule violations exist within a five year period after final delivery of service for a specific funding year.[51]

The investigation and decision to recover funds from Premio was not made within this five-year limitations period. To comply with the Fifth Report and Order, SLD needed to complete its investigation of the Year One-Carryover Servers on or before May 5, 2005, the date five years after the last delivery of servers was made in this case.[52] The Decision at issue, which was completed and relayed to Premio on August 10, 2005, was not completed within that time. Accordingly, the Decision is untimely, and cannot properly be invoked to recover funds disbursed for Funding Year 1999 from Premio.

In the Decision on Appeal, the SLD argued that it had met the five-year period because such period did not begin to run until September 30, 2000. As it explained:

> It was also determined that according to the program rules all non-recurring services must be delivered and installed between July 1 of the relevant funding year (1999 in this case) and September 30, following the June 30 close (2000 in this case) of that funding year (i.e., 15 months after the beginning of the funding year). . . . According to our records, no extension of the September 30, 2000 final date of delivery was requested and $895,541.05 of funding was disbursed for servers. . . . The SLD issued the Recovery of Improperly Disbursed Funds (RIDF) Letter on August 10, 2005 which is within the FCC five-year administrative limitations period of September 20, 2000 to September 30, 2005.[53]

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[51] *Id.* (emphasis added).

[52] The LAUSD forms acknowledging receipt of the 30 accepted servers corroborate this time frame. *See* Exhibit O at 042 (corroborating receipt by Millikan Middle School on 5/1/00); 044 (corroborating receipt by Van Nuys Middle School on 5/3/00).

[53] Exhibit B at 2.

However, SLD's calculation of the five-year time limitations period relies on a misreading of the Commission's clear directive. The limitations period is to run from the date of "the final delivery of service for a specific funding year." Here, the SLD amends the Commission's order to start the date from "the final date upon which delivery of service *could have been* made for a specific funding year." If the Commission had meant the latter, it would have written it that way. However, it used the words "final delivery of service for a specific funding year" repeatedly and never once implied that it meant the date on which final delivery *could* be made.

In fact, the Commission noted that "[f]or consistency, our policy for audits and other investigations mirrors the time that beneficiaries are required to retain documents pursuant to the rule adopted in this order."[54] Thus, it was the intent of the Commission that the limitations period for investigations run concurrent with the period which the investigated parties were required to retain documents. 47 C.F.R. § 54.516(a)(1) is clear that schools and libraries "shall retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least five years after the last day of service delivered in a particular Funding Year." 47 C.F.R. § 54.516(a)(2) requires that service providers "shall retain documents related to the delivery of discounted telecommunications and other supported services for at least 5 years after the last day of delivery of discounted services." In subsection (a)(1) the use of the word "delivered" rather than "delivery" makes clear that it refers to the date of actual delivery rather than the last date upon which a delivery could be made. Furthermore, in both subsections, the first time "delivery" appears, it clearly refers to an actual delivery since one cannot keep records of a delivery which never occurred. It only makes sense then, that the word "delivery" used later in the same sentence refers to the same thing (i.e.,

[54] Fifth Report and Order ¶ 32.

an actual delivery). The meaning of the Commission's order is clear and cannot be rewritten by SLD to cover up its own mistakes.[55]

In addition, SLD's interpretation is manifestly unfair. On the one hand, SLD claims that Premio must repay the disbursements because Premio's last delivery date was on May 5, 2000, and that Premio made no deliveries after that date. On other hand, SLD now claims that the words "final delivery of service" means the last date on which Premio *could have* made delivery. SLD cannot have it both ways. LAUSD refused to accept any servers on May 12, 2000. As of that date, Premio could not have "delivered" any more servers and there is no argument that LAUSD would have accepted the servers on September 30, 2000. Neither Premio nor LAUSD ever hid this fact from SLD and SLD could have started its investigation as early as May of 2000.

This is also not a case in which Premio engaged in any behavior that might justify a departure from the limitations period policy. Information provided to SLD during the investigation also confirmed that at all times Premio was -- and remains -- ready, willing, and able to deliver the remaining servers to the LAUSD.[56] Nowhere in the Notification or the

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[55] SLD's interpretation also makes no sense as a matter of policy. According to the SLD's interpretation, if Premio was scheduled to deliver on July 1, 1999 (the first date possible for that funding year) and ran into problems with LAUSD, SLD would have until September 30, 2005 to conclude its investigation. Similarly, if Premio was scheduled to deliver on September 30, 2000 (the last date possible for that funding year) and run into problems with LAUSD, SLD would still have until September 30, 2005 to complete its investigation. SLD would have almost 15 more months to complete its investigation in the first case, merely because the parties happened to set a delivery date that was early in the funding year rather than late.

[56] *See* Ex. C, at 0023-26; 029; 033; and 057.USAC's investigation in this case was comprised of discussions and correspondence with counsel for Premio and LAUSD. The correspondence was conducted primarily through electronic-mail. A series of this electronic-mail correspondence among and between counsel for Premio, LAUSD, and USAC is attached hereto as Exhibit C. Although Premio has not intentionally withheld or excluded any messages from this correspondence, it is not certain whether Exhibit C contains every electronic-mail message between or among the parties that formed the basis of USAC's investigation.

Decision on Appeal does SLD make any argument that necessary information was withheld from it. In fact, the opposite was true. Premio explained the circumstances of the pending lawsuit to SLD, and repeatedly requested an expedited decision about whether SLD would seek to recover the E-rate funds disbursed for FRNs 238460 and 238465 from either party,[57] as well as when SLD would pay Premio the approximately $700,000.00 owed to Premio by SLD for FRN 260296, an FRN for the 2000 E-rate year contract between LAUSD and Premio.[58] SLD's investigation was comprised primarily of discussions and correspondence with counsel for Premio and LAUSD.[59] There is no dispute that Premio was cooperative and provided SLD with all requested information and documentation.

Finally, this argument is not based on a mere technicality. As the Commission foresaw, companies like Premio suffer real detriment when the SLD fails to complete investigations in a timely manner. This was the case here. As a result of their inability to resolve their differences, on February 14, 2003, Premio filed suit against LAUSD in Los Angeles Superior Court for breach of the E-rate contract. As the case progressed, both parties seriously discussed the potential for settlement and were, in fact, under pressure from the judge to come to a decision on settlement. However, since LAUSD's share of the payments for the servers was approximately 11% and the Universal Service Fund's share was approximately 89%, it was difficult to settle the case without knowing SLD's decision. The parties had to negotiate without full knowledge as to

[57] *See, e.g.*, Exhibit O at 023-26; 028-31; 038-50; 053-54; 057 (*LAUSD* recanting its earlier representation to the contrary, and confirming receipt of 30 servers).

[58] *See, e.g.*, Exhibit O at 027; 028-31; 032-33.

[59] *See generally* Exhibit O, the progression of which shows that LAUSD did not respond promptly to USAC's inquiries, and that it was after Premio provided documentation corroborating its version of events, LAUSD recanted the (now admittedly inaccurate) accusation that Premio never tendered the 128 servers or delivered any equipment under the 1999 E-rate year contract at issue, which appears to have prompted USAC to initiate this investigation.

the disposition of the bulk of the money at issue. Counsel for Premio and LAUSD worked together to provide SLD with information so that they would receive a timely decision. Despite their best efforts, SLD's belated decision was made almost two and half years after the lawsuit was filed and well after the parties had agreed on practically all the terms of the settlement agreement.

Despite Premio's cooperation and repeated requests, and despite the limited extent of its investigation, SLD did not render an expedited decision, nor did it conclude its investigation within the administrative limitations period. Furthermore, this tardiness caused serious problems for Premio in its negotiations with LAUSD over this dispute. SLD should not be allowed to rewrite FCC policy in order to cover up its failure. The FCC policy imposing a five-year administrative limitations period should control and the Commission should rescind the Notification and Decision on Appeal.[60]

IV. ALTERNATIVE REQUEST FOR DISCRETIONARY WAIVER.

In the alternative, if the Commission concludes that Premio violated a law or FCC rule in connection with the disbursement of funds for FRNs 238460 and 238465, Premio respectfully requests that the Commission exercise its discretion to waive the rules violation.[61] As explained above, Premio expended substantial amounts of money and labor to manufacture the servers, was

[60] In addition, in the Decision on Appeal, the Administrator ruled only on the limitations period argument as it pertained to FRN 234860. USAC made no mention of FRN 238465 and only concluded that SLD would seek the funds disbursed pursuant to FRN 234860. It is unclear whether the Administrator accepted Premio's limitations argument as it applied to FRN 238465. This is yet another instance in which the Notification's and Decision on Appeal's procedural deficiencies have caused Premio serious difficulty in responding.

[61] *See In re Changes to the Board of Directors of the Nat'l Exchange Carrier Assoc., Inc.*, 15 FCC Rcd 7197, FCC 97-21 (Oct. 8, 1999) (granting, on its own motion, a one-time limited waiver of four FCC rules pertinent to E-rate, and noting that regulations not required by statute may be waived in appropriate circumstances "and must be waived where failure to do so would amount to an abuse of discretion").

at all times willing and able to meet its obligations to deliver the servers on the dates and at the locations specified by LAUSD, did everything in its power to ensure that no laws or regulations were violated, is not the party most responsible for causing the violations and acted in good faith during the course of the subsequent SLD investigation. Under these circumstances, it would be unfair to require Premio to repay funds disbursed by SLD.

V. ENTITLEMENT TO $716,638.40 IN E-RATE FUNDS FOR FRN 260296.

Premio also had an E-rate contract with LAUSD for funding year 2000. The FRN for that contract was 260296. LAUSD has always represented to SLD – accurately -- that "Premio met its obligations and provided LAUSD goods and services under FRN 260296."[62] Premio is still due payment of $716,638.40 in E-rate funding for these goods and services. Despite this fact, once SLD began its investigation of the Year One-Carryover Servers, it has refused, without formal notification or ruling, to disburse the $716,638.40 owed under FRN 260296. Because SLD has made no formal decision on this matter, there is no decision for Premio to appeal and Premio is currently without recourse in seeking payment of these funds.

Premio understands that under the Commission's "Red Light Rule," USAC may withhold disbursements due under one E-Rate contract for failure to make payment with respect to another matter.[63] However, the Commission's rules specifically exempt situations in which the alleged debtor has "timely filed a challenge through an administrative appeal . . . ."[64] This is precisely what Premio has done and SLD may not withhold the funds due under FRN 260296 on that basis.

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[62] *See* Exhibit N.

[63] *See, e.g.*, 47 C.F.R. § 1.1910.

[64] *Id.* § 1.1910(b)(3)(i).

Neither USAC nor SLD has given any valid reason for its refusal to disburse funds under FRN 260296. The applicant has verified that it has received the goods under that contract and many years after the goods were delivered to the LAUSD, no dispute or problems have arisen. Nonetheless, SLD has not paid the outstanding Premio invoices for FRN 260296.

Premio therefore respectfully requests the Commission order SLD to disburse these funds, or if the Commission finds Premio responsible to repay the funds under FRN 238460 and 238465, that the Commission reduce the amount of any recovery it orders Premio to pay under FRNs 238460 and 238465 by the amount SLD owes Premio for FRN 260296, which is $716,638.40.[65]

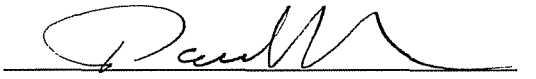
VI. CONCLUSION.

For the foregoing reasons, Premio respectfully requests that the Commission instruct the SLD either to rescind its Notice and Decision, or in the alternative, instruct the SLD to take no further action in this case against Premio. Alternatively, if the Commission finds that Premio is responsible to repay the amounts in the Notice and Decision, that such amounts be offset by the amount owed under FRN 260296.

[65] Premio understands that the FCC's Fifth Report and Order eliminated the set-off provisions of the FCC rules. However, the Commission did so to avoid administrative difficulties. This case presents no administrative difficulties since all of the funding requests at issue have long since been implemented and completed.

Respectfully submitted,

PREMIO COMPUTER, INC.

By: 

Premio Computer, Inc.
918 Radecki Court
City of Industry, CA 91748

Paul J. Loh
Nhan T. Vu
Willenken, Wilson, Loh & Lieb, LLP
707 S. Wilshire Blvd., Ste. 3850
Los Angeles, CA 90017
(213) 955-9240

Counsel for Premio Computer, Inc.

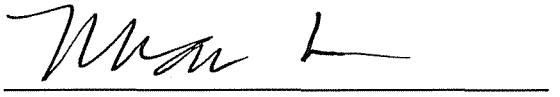
October 27, 2006

CERTIFICATE OF SERVICE

I, Nhan Vu, hereby declare that copies of the foregoing request for review were delivered by hand or by U.S. mail or by Federal Express, this day, October 27, 2006, to the following, as required by section 54.721(c) of the Commission's rules:

D. Scott Barash
Vice President and General Counsel
Universal Service Administrative Company
2120 L Street NW, Suite 600
Washington, D.C. 20037

Bernardo Foschetti
ITAF, Cluster #07
Los Angeles Unified School District
333 S. Beaudry
Los Angeles, CA 90017



October 27, 2006